

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

TROY MITCHELL

PLAINTIFF

VS.

NO. 2:00CV102PB

SHERATON TUNICA CORPORATION
d/b/a SHERATON CASINO and HOTEL

DEFENDANT

MEMORANDUM OPINION

This cause is before the Court on the defendant's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. The Court, having considered the motion, the briefs and authorities cited, is prepared to rule. The Court finds as follows, to-wit:

FACTUAL BACKGROUND

This case arises out of an alleged improper reporting of credit information by the defendant, Sheraton Casino, to Central Credit , Inc., a credit reporting agency used exclusively by casinos. On May 25, 1996, Plaintiff, Troy Mitchell, visited the Sheraton Casino in Robinsonville, Mississippi, as a gaming patron. While at the Sheraton, Mitchell asked for and was given a \$1000 extension of credit. Later, Mitchell took his winnings to the cashier's window and requested the return of his marker. The cashier took the winnings and retrieved the marker.

On approximately May 28, 1996, Mitchell was contacted by telephone by a Sheraton employee who allegedly accused Mitchell of leaving the Sheraton without retrieving his marker. Mitchell was informed that he had until June 9, 1996, to pay the marker or the Sheraton would commence a criminal action against him.

On June 3, 1996, another Sheraton employee known only as "Mark" contacted Mitchell and apologized for Sheraton's previous call. Mark assured Mitchell that there would be no further "harassing" calls, but, Mitchell alleges that he was told by Mark that the Sheraton would have to

"punish" him in some manner.

Thereafter, on five occasions, Mitchell was denied credit at various gaming establishments throughout the country due to Sheraton's report of an unpaid marker to the Central Credit Agency. The last of these incidents was June of 1998 at Gold Strike Casino in Tunica, Mississippi.

In April of 1997, The Mississippi Gaming Commission, responding to a complaint by Mitchell, rendered a favorable decision to the plaintiff finding that Mitchell had no outstanding marker at the Sheraton Casino. The Sheraton, however, despite the decision, did not take Mitchell's name off the adverse credit report until after commencement of the instant litigation, close to three years after the Commission's decision.

In his Complaint, filed on May 23, 2000, Mitchell alleges four counts against Sheraton including intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, and negligence. Sheraton now seeks summary judgment pursuant to Fed. R. Civ. P. 56 arguing that these claims are barred by the applicable statute of limitations.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A genuine issue of material fact exists when, after viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-moving party, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On the other hand, if a rational trier could not find for the nonmoving party based on the evidence presented, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-88 (1986).

LEGAL ANALYSIS

The only issue for this Court's determination is whether, construing Mississippi law, the

plaintiff's claims in this action are time barred. §15-1-35 of Miss. Code. Ann. provides:

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

The plaintiff's claim for defamation, therefore, is expressly subject to a one year statute of limitation. Likewise, although not explicitly referenced in the statute, a claim for intentional infliction of emotional distress is barred one year after such cause of action accrues under Mississippi law. Hervey v. Metlife General Ins. Corp. System Agency of Miss., Inc., 154 F.Supp.2d 909, 910 (S.D. Miss. 2001); Air Comfort Systems, Inc. v. Honeywell, Inc., 760 So.2d 43, 47 (Miss.Ct.App. 2000). On the other hand, negligence-based claims are subject to a general "catch-all" statute of limitations pursuant to Miss. Code. Ann. §15-1-49,¹ a three year statute of limitation.

The fact that a plaintiff alleges negligence, however, is not enough to save the action if such allegations fall squarely within a category included in the statute. According to the Mississippi Supreme Court:

It is clear that [Miss.Code Ann. § 15-1-35], which provides an inclusive listing of the recognized intentional torts is controlling in the case at bar. There can be no escape from the bar of the statute of limitations applicable to intentional torts by the mere refusal to style the cause brought in a recognized statutory category and thereby circumvent prohibition of the statute . Dennis v. Travelers Insurance Co., 234 So.2d 624, 627 (Miss. 1970). In Dennis, the defendant had sent a letter threatening legal action if the plaintiffs refused to pay for damages caused by vandalism perpetrated by their son. Id. at 626. The plaintiffs accused the defendants of a "willful, malicious and irresponsible act ... that they knew or should have known, would cause physical unrest and mental

¹ "In all actions for which no other period of limitations is prescribed shall be commenced within three (3) years next after the cause of such action accrued and not after." Miss. Code. Ann. §15-1-49.

distress to [plaintiffs]." Id. The Mississippi Supreme Court held that §15-1-35 barred the action. Id. In so holding, the court reasoned that although the plaintiffs' neglected to label their allegations as "menace", their claim still fell within the scope of the statute and was subject to the one-year statute of limitations. Thus, under Dennis, although Mitchell may allege negligence, his action may be subject to §15-1-35 regardless.²

Nevertheless, it may make little difference which statute applies in this particular instance. Specifically, Mitchell points to two allegations which he contends are negligence based. First, he points to the phone calls in which he was allegedly "harassed" and subsequently told by "Mark" that he would be "punished". Mitchell argues that this allegation "rings not of defamation, but instead of negligent and/or intentional infliction of emotional distress." It is undisputed, however, that the communications wherein the alleged "threats" were precipitated, occurred shortly after the original incident in the Spring of 1996. Thus, even if the court found that a negligence-based claim predicated on these events was cognizable, the action would be time barred.³

Secondly, Mitchell claims his allegation that "...Sheraton has intentionally and continually reported the existence of an unpaid marker by Mitchell", similarly sounds more in negligence and/or intentional infliction of emotional distress. The defendant, however, has offered the uncontradicted

² Notably, Mitchell originally filed this identical action in Arkansas alleging only defamation. The suit was dismissed for lack of in personam jurisdiction, and Mitchell filed his Mississippi civil action adding the negligence-based allegations.

³ Incidentally, it is likely that Mitchell's complaints as to the phone calls are, when fairly construed, allegations of menace. In Dennis, the Mississippi Supreme Court looked to Webster's Dictionary for the definition of "menace", noting that "[p]opular words in statutes must be accepted in their popular sense and the court must attempt to glean from the statute legislative intent." Dennis, 234 So.2d at 626 (citing Mississippi State Tax Comm'n v. Hinton, 218 So.2d 740 (Miss. 1969)). The court stated, "Webster's International Dictionary, Third Edition, among many definitions of the word 'menace' lists '1 a: a show of intention to inflict harm: a threatening gesture, statement, or act.... b: threatening import, character, or aspect: THREAT. 2 a: someone or something that represents a threat.'" The phone calls Mitchell complains of fit squarely within the definition.

affidavit of Mike Gallion, Director of Cage and Credit at Sheraton, in which he states unambiguously that the Sheraton made reports to Central Credit, Inc., concerning the disputed indebtedness on only two occasions; once on May 25, 1996, and again on September 28, 1996, for the purpose of writing off the indebtedness. Thus, even applying a three limitations from the last date reported – 1996 – the claim based on this allegation would, likewise, be time- barred.

The culmination of Mitchell's argument to evade a statute of limitations bar, however, is that "Defendant Sheraton refused to remove Mitchell from [Central Credit] report even after being informed by the Mississippi Gaming Commission (upon investigation) that Mitchell had no outstanding markers." The crux of his argument, therefore, is that all of these allegations taken together coupled with Sheraton's continual failure to "correct" the report constitutes "continuing tortious conduct" and, as such, his claims are exempt from the running of any applicable statute of limitations – one-year, three-year or otherwise – until cessation of the "continuous act". Indeed, on this basis, the plaintiff argues that the time he was removed from the credit report, shortly before the instant litigation, should mark the starting point of the running of any applicable statute of limitations. In the alternative, the plaintiff urges the Court to adopt June 20, 1998, the last time Mitchell was denied credit by a casino based on the credit report, as the relevant commencement of the statute of limitations.

The Mississippi Supreme Court has stated that in the case of a tort involving repeated or continuing injury, however, limitations begin to run from "the date of the last injury, or when the tortious acts cease." Stevens v. Lake, 615 So.2d 1177, 1183 (Miss. 1993). The Court further explained:

A "continuing tort" is one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. *A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts not by continual ill effects from an original violation.*

Stevens 615 So.2d at 1183 (emphasis in original). In the instant case, it is precisely "continual ill effects from an original violation" that Mitchell complains of and contends should toll the statute. The "original violation" is the alleged erroneous reporting of the indebtedness. The "continual ill effect" of that alleged

violation is the fact that Mitchell remained on the credit report. Under Mitchell's theory, however, the statute would be tolled for each day the Sheraton failed to remove him from the report. As the defendant points out, such a holding would undermine the purposes of limitations of action. It would mean, in essence, that the statute of limitations would never run against any alleged tortfeasor who failed to correct his actions after having the opportunity to do so. In light of the Mississippi Supreme Court's holding in Stevens, therefore, as well as the fact that Mississippi courts "will not apply the continuing tort doctrine when harm reverberates from one wrongful act or omission", Smith v. Franklin Custodian Funds, Inc., 726 So. 2d 144 (Miss. 1998), the Court rejects Mitchell's continuing tort theory on these facts. Quite simply, the failure of Sheraton to remove the defendant, even after the Gaming Commission decision, was insufficient to toll the statute of limitations. Consequently, the Court rejects the plaintiff's invitation to adopt the date when Sheraton finally did remove Mitchell from the report as the starting point for the running of the statute.

The Court also rejects Mitchell's suggestion that June 20, 1998, the date of the last denial of credit, be the date from which the statute should run. First, putting aside Mitchell's continuing tort theory for a moment, a claim based on this date could only be fairly construed as a defamation claim, if as a claim at all, because it would be predicated on the publication of defamatory information to a third party. Thus, the claim would fall within the scope of §15-1-35. It is well established that an action for defamation "accrues" on the date of publication in Mississippi. Ellisville State School v. Merrill, 732 So.2d 198, 200 (Miss. 1999); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So.2d 344 (1943). *See also* McCorkle v. McCorkle, 2001 WL 19727, at *5 (Miss.Ct.App. 2001). Applying the one-year statute from this particular publication, the action would be time-barred in light of the fact that this action was not commenced until May of 2000.

Incidentally, even holding that a claim for defamation could lie against Sheraton based on this particular publication would be dubious. For, Sheraton had long since published the information for the purposes of a defamation cause of action for the last time in 1996. The publication in 1998, on the other hand, was by Central Credit, not Sheraton. If a defendant in a defamation case could be imputed

with a publication by a third party, the statute of limitations for a defamation action would never run because each time the defamatory information was re-published by any third party, the one year statute of limitations would revive from that particular date. Taken to its logical conclusion, the result would be a reviving of the defamation action *ad infinitum*, and the purpose of the statute of limitation on the action would be eviscerated. This reasoning is in line with the preceding discussion pertaining to the continuing tort theory.

In the same vein, and also in line with the earlier discussion regarding the continuing tort theory, a finding that a negligence-based action could lie based on the subsequent publication by a third party would also be dubious. The result would be that each time a defamatory statement was published by a third party, a separate negligence cause of action would be conceived, if the opportunity for the original publisher to "correct" the information existed. Again, this could perpetuate *ad infinitum*, and, thus, serve to frustrate the intent of the legislature in the underlying policy of statutes of limitations. In short, this analysis ties directly in to this Court's rejection of Mitchell's theory that Sheraton's failure to "correct", on these facts, tolls the running of the statute. Simply put, the Court concludes that the denials of credit to Mitchell, culminating in the denial on June 20, 1998, by the Gold Strike Casino are "...ill effects from an original violation", and, therefore, "insufficient to toll a statute of limitations."⁴

Having rejected the continuing tort theory and, with it, the two dates proposed by the plaintiff from which to run a limitations period, the most recent date the statute could run from in this Court's view is September 28, 1996, the date in which Sheraton reported the credit information for the last time. Even giving the plaintiff all benefit of doubt and assuming that the three year "catch-all" statute applied from this date, Mitchell's claims would be time-barred. In the alternative, even assuming that

⁴ Furthermore, a finding that the subsequent reporting of information somehow constituted intentional infliction of emotional distress would not save the plaintiff's claim. As already discussed, under the analysis in Hervey v. Metlife General Ins. Corp. System Agency of Miss., Inc., 154 F.Supp.2d 909, 910 (S.D. Miss. 2001), such a claim is subject to a one-year limitations period.

the failure to remove the plaintiff from the credit report upon learning that the Gaming Commission rendered a favorable decision to Mitchell constituted a cognizable negligence-based tort on the part of Sheraton, as Mitchell alleges, the statute would run from April 7, 1997. Any harm after that date constitutes subsequent "ill effects" of the omission; here, the omission consisting of the failure to promptly remove Mitchell from the report upon learning of the Gaming Commission's decision. Under either scenario, minus this Court's application of Mitchell's continuing tort theory which would toll the statute for each day Sheraton failed to remove him from the report, the plaintiff's action is time-barred as more than three years elapsed between each of those dates and the commencement of this action in May of 2000.

Based on the foregoing analysis, the Court finds that the plaintiff's claims in this case are precluded as time- barred. Accordingly, no genuine issue of material fact exists and the defendant's Motion for Summary Judgment is granted.

CONCLUSION

After careful consideration, the Court finds that the defendant's Motion for Summary Judgment is well taken and should be granted. A separate order in accordance with this opinion will be so entered.

THIS, the ____ day of October, 2001.

W. ALLEN PEPPER, JR.
UNITED STATES DISTRICT JUDGE

